CHYE CHONG & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) April 9, 1974]
[Ipoh — Criminal Appeal No. 99 of 1972]

Mining — Sluicing — Mining operations — "Work on land by ground sluicing" — Mining Enactment (F.M.S. Cap. 147), s. 90.

Criminal Law and Procedure — Penal statute — Construction — Benefit of any doubt.

The appellants were charged that they did "work on land by ground sluicing" in contravention of section 90 of the Mining Enactment. It appeared that when the Inspector of Mines visited the land he found the four appellants at work. Two of them were holding monitors and the other two were sluicing the land. The appellants in their defence stated that they were trying to make a pond by use of the monitors and by sluicing the land.

Held: the words "work on land by ground sluicing" in section 90 have to be read in the context of the Mining Enactment. In this case the prosecution had failed to prove that the sluicing of the land and the use of monitors were for the purpose of mining and therefore the conviction of the appellants must be set aside.

Cases referred to:-

(1) *Lim Kim Choy* v. *Wong Chow* [1952] M.L.J. 20, 23; [1953] M.L.J. 81, C.A.

(2) *Rumball* v. *Schmidt* (1882) 8 Q.B.D. 603.

(3) *The London County Council* v. *The Aylesbury Dairy Company, Ltd.* [1898] 1 Q.B. 106 (109).

(4) *The Gauntlet* (1872) L.R. 4 P.C. 184, 191.

CRIMINAL APPEAL.

Chinn Swee Onn for the appellants.

Abdul Kadir bin Sulaiman (Deputy Public Prosecutor) for the respondent.

Sharma J. (delivering oral judgment): The appellants were originally charged under section 118 of the Mining Enactment. This charge was, however, at the end of the case for the prosecution amended to one for working on the land in contravention of the provisions of section 90 of the Mining Enactment. A contravention of section 90 of the Mining Enactment is punishable under section 125 of the said Enactment. The amended charge reads:—

"That you on 28.12.71 at about 11.35 a.m. at Lot No. 6332, 38¼ milestone Tapah/Bidor Road, Tapah, in the District of Batang Padang, in the State of Perak, did work on land by ground sluicing in contravention of section 90 of the Mining Enactment, Cap. 147, and punishable under section 125 of the aforesaid Enactment."

The facts briefly were that one Hoo Weng Keong (DW1) was the holder of a Temporary Occupation Licence issued to him in respect of the land in question. The Temporary Occupation Licence was granted to him for the purpose of rearing fish. He had employed Lee Loi Pin (PW5) as his manager. The land was originally a part of Mining Lease No: 3536 of 1970. This lease had expired on 16 June 1970. On 28 December 1971 the Inspector of Mines, Tapah (PW3) accompanied by PW1 and PW2 went to the land in question and found the four appellants at work. Two of the appellants were holding monitors and the other two were sluicing the land. This was all he observed and that in short was the entire prosecution evidence. PW3 admitted that he did not take any sample of the soil and he could not say if there was any mineral content still left in the land. He, however, thought that the operation by the four appellants constituted "mining". No palong, dulang or other mining equipment except a water pump and the monitors were to be found on the land. PW's evidence was that the land had been worked out.

Section 125 of the Mining Enactment reads:—

"125. Any person who ... shall commit a breach of any of the provisions of Part IX shall be liable to a fine of one thousand dollars...."

Part IX of the Mining Enactment deals with "The Regulation of Mining Operations" and comprises section 77 to 94 of the Enactment. Section 90 which is the only relevant section in connection with the appeal reads:—

"90. Save as is provided by this Enactment, no person shall work any land by ground sluicing or gravel pumping or by any method of removing or excavating earth by the direct action of water."

Section 90 finds its place in Part IX of the Enactment. It is thus obvious that its provisions are aimed at *regulating mining operations*.

"Mining" is defined in section 3 of the Enactment and according to this definition "mining" or "to mine" *means* to disturb, remove, cart, carry, wash, sift, smelt, refine, crush or otherwise deal with any rock, ... by any mode or method whatever *for the purpose* of obtaining metal or mineral therefrom." Regulation of mining operations in Part IX consequently means regulation of that operation which has for its purpose the obtaining of metal or minerals from the land. What constitutes mining operations is dealt with in the case of *Lim Kim Choy* v. *Wong Chow*.[1] Thomson J. (as he then was) there said:

"It seems to me that 'mining operations' must include *every and any physical act* which is *designed to produce the effect of mining.*"

This case went on appeal and the judgment of the Court of Appeal is to be found in [1953] M.L.J. 81. The argument of the appellant before the Court of Appeal was that boring did not constitute a mining operation, that it was but only a part of the preliminary process of prospecting, that prospecting could by no means constitute mining and that boring the land could not be labelled as mining operation. The Court of Appeal rejected this contention of the appellant and expressed its full agreement with Thomson J. (as he then was).

What the learned magistrate had to decide in this case was whether the mere fact that two of the defendants were found holding monitors and the other two sluicing the land constituted working the land by ground sluicing. A sluice is a contrivance for controlling the flow of water and to sluice is to freely swill or pour water on the land in order to wash that land and a monitor is nothing but a jointed nozzle used in hydraulic mining which can be turned in any direction. The words "work any land by ground sluicing" in section 90, in my view, have to be read in the context of the Mining Enactment. The very preamble to the Enactment says that the object of the Enactment was to amend and consolidate the law *relating to mining*. Working the land consequently should be with a view to mining, i.e. for the purpose of obtaining metal or minerals therefrom. The prosecution should not have stopped short of leading any evidence as to the purpose

for which the operations were being carried on by the defendants on the land.

"Land" is defined in section 5 of the National Land Code and includes the surface of the earth and all substances forming that surface as well as the earth below the surface and all substances therein.

A Temporary Occupation Licence is granted under section 65 of the National Land Code and can be issued for any purpose other than those prohibited by section 42(2). This makes it quite clear that the State Authority is not competent to grant a Temporary Occupation Licence for purposes of mining. Under section 44(1)(a) of the National Land Code the holder of a Temporary Occupation Licence is entitled to the exclusive use and enjoyment of "so much of the land below the surface as is reasonably necessary to the lawful use and enjoyment of the land." Under section 45(1)(a) he can extract, move or use within the boundaries of the land any rock material in or upon the land but he is not entitled to extract any metal or mineral from any rock material in or on the land or to remove if beyond the boundaries of the land unless he is so authorised under the Mining Enactment.

The Temporary Occupation Licence in question was granted for the purpose of a fish pond. A pond could not be made unless some earth was removed from or dug out of the land. The mere fact that an unconventional means to achieve the object is adopted does not necessarily mean that the means adopted were for an illegal purpose. No such presumption can arise in criminal law unless the statute so provides. Penal statutes have to be fairly construed and faithfully applied according to the intent of the Legislature, taking care that no unwarranted severity is caused on the one hand and no unjustifiable lenity is shown on the other. In case of doubt the practice of the courts always is to lean towards mercy. If the Enactment imposes a penalty for a criminal offence the person against whom it is sought to enforce the penalty is always entitled to the benefit of any doubt which may arise in the construction of the statute. (See *Rumball* v. *Schmidt*[2] and *The London County Council* v. *The Aylesbury Dairy Company, Limited.*[3]) Wright J. in *The London County Council* v. *The Aylesbury Dairy Company, Limited*[3] said:

"... Where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."

The Judical Committee of the Privy Council in the case of *The Gauntlet*[4] said:

"No doubt all penal Statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment."

In the present case the prosecution had failed to prove that the sluicing of the land and the use of monitors was for the purpose of mining. In view of that I am of the opinion that the learned magistrate should not have called upon the defence of the appellants. In any case the defence of the appellants was that they were trying to make a pond by use of the monitors and by sluicing the land. There was nothing illegal in doing that.

The appeal is allowed and the order of the learned magistrate is set aside. The fine, if paid, will be repaid to the appellants.

Appeal allowed.

Solicitors: *Chinn Swee Onn.*

PUBLIC PROSECUTOR v. TAN KIM LIM

[A.Cr.J. (Syed Othman J.) May 21, 1974]
[Johore Bahru — Criminal Appeal No. 35 of 1973]

Excise Act, 1961, ss. 2, 16(1) & 73(1) — "Manufacture" — Importation of second-hand car components and putting them together — Whether "manufacture" of car.

Sharikat Perniagaan Malaysia Barat of Muar had a car in Singapore bearing registration No. SN7257. It obtained an approved permit to import a second-hand body and chassis of a car from Singapore. This was imported into Johore Bahru on August 20, 1971. On August 28, 1971 under the name of the "sharikat" the respondent imported a second-hand diesel engine. For this no permit was required. The body and chassis for customs purposes were valued at $1,500 and the total duty paid on them was $735. The engine was valued at $500 and duty leviable was $200. But the car components were actually parts of SN7257, and if this car had been imported, its value would have been assessed at not less than $10,000 and duty thereon would be 49% of the value. On getting the parts into Johore Bahru, the respondent brought them to a service station and had them assembled. This was done at a charge of $49.10. Subsequently the RIMV Malacca, registered the car as MD2917 in the name of the respondent's wife.

The Customs made investigation and lodged a complaint and consequently the respondent and the manager of the "sharikat" were charged in the Sessions Court with an offence under section 73(1) of the Excise Act, 1961 to the effect that they not being licensed for the purpose were knowingly concerned in manufacturing dutiable good, i.e. a car. The case against the manager of "sharikat" was not proceeded. The learned President held that the respondent had no case to answer and he made the following finding: "The same old engine was put back into the same old chassis etc. in Johore Bahru and new tyres were attached to them.... Besides being given a new registration number and different set of tyres this was the same old car. There has been no transformation into a new thing. This was only putting back together of 2 main parts of an already manufactured old car. I do not think this is manufacturing".

The Public Prosecutor appealed

Held: (1) any conversion or transformation of any article or material into goods which by their nature is dutiable under the Excise Act is manufacturing for the purposes of the Act;

(2) if the goods which are manufactured attract excise duty then there must be a licence for that manufacture. It was not necessary to show that the manufacture should be on a large scale. The test was whether excise duty was leviable on the goods produced;

(3) in this case the process of putting the compenent parts together so as to turn them into a car was the act of manufacturing. Since excise duty was leviable on a car, a licence was required for its manufacture;

(4) on the evidence established by the prosecution the acts of the respondent came within the offence charged, i.e. he was concerned in the manufacture.